

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARCELLA WOODY,

Claimant,

v.

SENECA FOODS,

Employer,

and

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA,

Surety,

Defendants.

IC 2010-012114

**ORDER ON
RECONSIDERATION**

Filed September 20, 2013

This matter is before the Commission on Defendants' Motion for Reconsideration and Memorandum in support filed on June 11, 2013, requesting reconsideration of the Industrial Commission's decision filed May 23, 2013, in the above referenced case. Claimant filed a response on July 3, 2013, and no reply was filed.

At hearing, Claimant alleged that she sustained an industrial meniscal tear to her previously asymptomatic right knee when she stepped into a hole in the concrete at work and she requires a right total knee arthroplasty as well as impairment and disability benefits. Defendants contended that Claimant had suffered symptomatic bilateral knee osteoarthritis since at least 2008 and that, at most, her right knee condition was temporarily exacerbated by her industrial injury.

The Commission's Recommendation and Order found that the evidence and the opinions

of Drs. McKee and Surbaugh support a finding that Claimant incurred a meniscal injury due to her industrial injury. Further the Commission found that the opinions of Drs. McKee, Surbaugh and Bates were more persuasive than those of Dr. Schwartzman, leading the Commission to conclude that Claimant's knee condition was the result of the permanent aggravation of her preexisting degenerative joint disease (DJD) by her industrial injury.

The Commission concluded that Claimant proved she sustained an injury to her right knee medial meniscus as a result of the industrial accident on March 26, 2010; that Claimant proved entitlement to temporary disability benefits from March 26, 2010 through December 6, 2011; and that Claimant proved she sustained 63% permanent partial disability.

In their motion for reconsideration, Defendants argue that the Commission erred in awarding TTDs from March 26, 2010 through December 6, 2011, erred in awarding 63% disability in excess of impairment, and erred in ruling that Claimant's pre-existing conditions were permanently exacerbated by the industrial accident.

Claimant first states that there is no confusion with the award of temporary disability because the recommendation states that the award is subject to appropriate offsets for benefits and/or wages already paid. Claimant agrees with Defendants that the order of disability in excess of impairment is an error in the order and it is correctly written in the recommendation. As to the final argument, Claimant argues that the decision is supported by substantial and competent evidence, as Drs. Surbaugh, McKee, and Schwartzman all opined that the fall aggravated Claimant's pre-existing osteoarthritis.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within 20 days from the date of the filing of the decision, any party may move for reconsideration. Idaho Code § 72-718. However, "it is axiomatic that

a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." Curtis v. M.H. King Co., 142 Idaho 383, 388, 128 P.3d 920 (2005).

On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during reconsideration. Davison v. H.H. Keim Co., Ltd., 110 Idaho 758, 718 P.2d 1196. The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code § 72-718. *See*, Dennis v. School District No. 91, 135 Idaho 94, 15 P.3d 329 (2000) (citing Kindred v. Amalgamated Sugar Co., 114 Idaho 284, 756 P.2d 410 (1988)).

A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

Defendants first argue that the Commission erred in awarding Claimant TTDs from March 26, 2010 through December 6, 2011. Defendants agree that Claimant suffered an injury on March 26, 2010 and that she was declared stable on December 6, 2011. Defendants argue that Claimant continued to work for quite some time during that period. Claimant and the Commission agree with Defendants that they are entitled to credit for benefits paid and/or periods for which Claimant was paid wages. The Commission finds no substantial dispute between the parties and will clarify the Commission's Order by including the following statement: Defendants are entitled to credit for benefits paid and wage paid during periods

Claimant worked.

Secondly, Defendants argue that the Commission erred in concluding that Claimant's 63% permanent partial disability award is in excess of impairment. Defendants are correct. The Conclusions of Law and Order are hereby modified to state the following: Claimant has proven that she has sustained 63% permanent partial disability inclusive of impairment.

Defendants' final argument is that there was not substantial and competent evidence to support a finding of causation that Claimant's pre-existing conditions were permanently exacerbated by the industrial accident. Defendants also express concern about the length of time the Referee spent on the decision and about the fact that the case was reassigned following Referee Just's retirement.

That Referee Marsters devoted substantial effort to this case is evidenced by her detailed findings and analysis. The Commission is more than satisfied with the recommendation and order in this matter. The parties requested three extensions for briefing which pushed the date the case came under advisement out an additional two months, which fell just beyond Referee Just's retirement date. Further, a notice of reassignment was filed on April 23, 2013, just one day after the case came under advisement. The notice of reassignment clearly stated that the case was being reassigned to Referee Marsters due to the retirement of Referee Just. Defendants did not object upon receipt of the notice of reassignment. Finally, the Commissioners review all recommendations and a recommendation is not final until it is approved by an order signed by the Commissioners. The Commissioners reviewed the file in this case and approved the recommendation.

Defendants contend that Dr. Surbaugh's conclusions were haphazard and that the findings of Defendants' expert, Dr. Schwartsman, were ignored. The decision did not ignore

Dr. Schwartzman's views, as is evidenced by the Commission's analysis of his opinion, but the Commission did find his opinion to be less persuasive when viewed in light of the record was reviewed *in toto*. The Commission appreciates that Drs. Schwartzman and McKee raised doubts about the casual relationship between Claimant's knee condition and the industrial injury, but those issues were resolved in the decision.

The decision discussed Claimant's credibility and found that, when Claimant's testimony conflicted with the medical records, the medical records more credible than her testimony. Those records establish bilateral knee osteoarthritis and treatment in 2008, prior to the March 2010 industrial injury. The decision carefully sets forth the conflicting opinions and explains why Drs. McKee and Surbaugh are found to be more persuasive in concluding that Claimant incurred an additional meniscal injury due to her industrial accident. Further, the Commission concluded that the opinions of Drs. McKee, Surbaugh and Bates all support a conclusion that Claimant's industrial accident and injury resulted in a permanent aggravation of her preexisting DJD.

The Commission has reviewed the record with a focus on the concerns that Defendants have raised in the motion for reconsideration. Based on the record as a whole, the Commission determined that Claimant had proven that her right knee injury and resulting medical treatment were causally related to her 2010 industrial accident. Although Defendants disagree with the Commission's conclusion on that issue, the Commission finds the decision of May 23, 2013 is supported by substantial evidence in the record and Defendants have presented no persuasive argument to disturb the decision as to the issue of causation.

Accordingly, the Commission denies Defendants' motion as it pertains to the reconsideration on the issue of causation. The Commission grants Defendants' motion to

reconsider and orders that conclusions 4. and 6. in the Conclusions of Law (page 43) and the Order (page 2) be substituted with the sentences below.

4. Claimant has proven she is entitled to temporary disability benefits from March 26, 2010 through December 6, 2011. Defendants are entitled to credit for benefits paid and wage paid during periods Claimant worked.

6. Claimant has proven that she has sustained 63% permanent partial disability inclusive of impairment.

IT IS SO ORDERED.

DATED this 20th day of September, 2013.

INDUSTRIAL COMMISSION

/s/ Thomas P. Baskin, Chairman

/s/ R.D. Maynard, Commissioner

/s/ Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2013, a true and correct copy of the foregoing **ORDER on RECONSIDERATION** was served by regular United States Mail upon each of the following:

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